Court of Appeals Case No. 64291-0

Case No. 86109-9

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BIRD,

Respondent,

v.

BEST PLUMBING GROUP, LLC,

Respondent,

v.

FARMERS INSURANCE EXCHANGE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT JAMES BIRD

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INTRODUCTION

Six and a half years have passed since Best Plumbing cut the sewer pipe 10 feet from Mr. Bird's residence, 2 Tr. 219:8–23, causing devastating slope destabilization, the need to install a retaining wall to save the house, and major disruption of the Birds' lives. The property remains unrepaired. Under the approach advocated by Farmers, restoration of the Birds' property to the degree necessary to allow them quiet enjoyment of their property rights will be further postponed through a jury trial and, very often, appeal. Having abandoned the good-faith obligations it owes its insured, Best Plumbing, Farmers now asserts a "right" to litigate the amount of damages in a jury trial. In so asserting, Farmers confuses its rights with those of its insured; contravenes decades of Washington law holding that reasonableness hearings are equitable proceedings decided by judges; and seeks to transfer to the injured parties (the Birds, Best Plumbing) the risk of injury and delay that Farmers accepted insurance premiums to guard against.

ISSUES PRESENTED FOR REVIEW

I. Whether there is a constitutional right to a jury in an equitable hearing to determine the reasonableness of a settlement.

II. Whether the superior court denied Farmers Insurance Exchange due process, even though it allowed four months to prepare for the

hearing, authorized discovery, and considered Farmers' evidence and voluminous arguments in a four-day hearing.

III. Whether substantial evidence supports the superior court's decision regarding treble damages under RCW 4.24.630.

STATEMENT OF THE CASE

Please see the statement of the case in Mr. Bird's response to the petition for review.

ARGUMENT

I. THERE IS NO RIGHT TO A JURY IN AN EQUITABLE REASONABLENESS HEARING.

A. Farmers asserts a jury right that belonged to its insured, Best Plumbing.

In arguing that it has a right to a jury trial in the tort case between Mr. Bird and Best Plumbing, Farmers conflates the rights of its insured with its own. Best Plumbing, not Farmers, was the defendant in the case. It and Mr. Bird were the persons who had a constitutional right to a jury. Const. Art. 1, § 21. Like all civil litigants, Mr. Bird and Best Plumbing had the right to negotiate away their right to a jury trial in order to achieve a settlement. Settlements are favored under Washington law, *see Haller v. Wallis*, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978) ("The law favors settlements, and consequently it must also favor their finality."), for several reasons. **1st**, settlements reduce the imposition on public resources

such as the judiciary. **2nd**, settlements save the public from having to second guess decisions of the parties respecting their rights and obligations. **3rd**, settlements allow for the peaceful resolution of disputes that otherwise might occasion great hostility and expense.

The fact that Farmers argues that **it** owns Best Plumbing's right to a jury trial is truly remarkable, especially when juxtaposed with the duties owed by an insurer to its insured—duties that were violated by the drove in this case: Prompt investigation, full and fair analysis of the facts and the law, full disclosure of the risks and the liabilities of the insured to the injured party, keeping the insured informed with respect to settlement opportunities, holding the insured's financial and legal position above (or at least not below) the insurer's, and settling within policy limits when liability has become reasonably clear. *See Evans v. Cont'l Cas. Co.*, 40 Wn.2d 614, 628–29, 245 P.2d 470 (1952); *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 179, 473 P.2d 193 (1970). Those are the duties that Farmers violated to the point that Best Plumbing was forced to take matters into its own hands by negotiating a settlement to protect itself from the likely catastrophic judgment in excess of policy limits.

Someone who has been sued always has the right to settle the claim regardless of whether an insurer commits bad faith. But when the plaintiff and the defendant believe the defendant's insurer refused to settle

the claim in bad faith, *Besel* gives them the right to enter into a settlement calling for a stipulated judgment, a covenant not to execute that judgment against the insured, and an assignment to the plaintiff of the insured's claims against the liability insurer. *Besel v. Viking Ins. Co. of Wis.*, 146 Wn.2d 730, 736–38, 49 P.3d 887 (2002). The trial judge conducts a hearing to determine whether the settlement amount is reasonable and, if it is not, to determine a lower amount that is. *See, e.g., Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 601–02, 216 P.3d 1110 (2009).

The plaintiff then commences a separate action against the insurer where the amount found reasonable serves as the presumptive measure of harm, but only if the plaintiff proves liability against the insurer in a jury trial. If the insurer prevails on liability, the plaintiff gets nothing. In other words, if the insurer's position is correct that it did not act in bad faith, the insurer has an opportunity for vindication by the jury in the bad-faith case. The covenant-judgment process thus requires all of the parties to "put their money where their mouths are." There are built-in incentives, on one hand, for the plaintiff and the defendant in the underlying case to settle only if they believe they will prove liability in the subsequent bad-faith case, and, on the other hand, for the liability insurer to act in good faith.

In this case, the trial court granted Mr. Bird partial summary

judgment holding that Best Plumbing "trespassed as a matter of law" and that "said trespass was a proximate cause of damage to the upper slope of Mr. Bird's property." Hr'g Ex. 20 at 2. Despite this, when Farmers attended mediation it offered **zero** to resolve the case and thereby protect its insured. CP 158. Even after Farmers fired the lawyer who told it that Best Plumbing had a 100% chance of losing, Hr'g Ex. 37 at 3; 3 Tr. 407:16–408:3, after Farmers' attempts to manipulate expert testimony were unmasked, *see* Resp.'s Br. at 11–14, and after Farmers' own lawyers told it that the defense engineer's opinions concerning Farmers' proposed repair would likely not be admissible because they were premised on a plan that had not been and would not be approved by the City of Seattle, Hr'g Ex. 35 at 2, Farmers offered only $230,000, CP 158, or less than a tenth the amount that the superior court judge ultimately found to be the reasonable settlement amount. Farmers' actions placed Best Plumbing in jeopardy of an excess verdict.

Farmers still could have chosen to protect its insured by agreeing to Best Plumbing's request to lift the policy limits. CP 2278–79. Farmers did not respond to that request, in violation of Washington claims-handling regulations. *See* CP 2280; WAC 284-30-330(2) (prohibiting the insurer's failure to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies);

WAC 284-30-360(3) ("For all other pertinent communications from a claimant reasonably suggesting that a response is expected, an appropriate reply must be provided within ten working days for individual insurance policies ...."). Best Plumbing believed it had no choice but to negotiate the best deal it could get. Again, this was Best Plumbing's right. *Besel*, 146 Wn.2d at 736, 738; *Evans*, 40 Wn.2d at 628. In so doing, Best Plumbing bargained away its right to a jury determination of damages in the underlying tort case.

Although Farmers has a legitimate right to have the reasonableness of the covenant judgment examined by the superior court, the procedure for doing so is well established in case law. *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 717–18, 658 P.2d 1230 (1983), *overruled on other grounds by Crown Controls, Inc. v. Smiley*, 110 Wn.2d 695, 756 P.2d 717 (1988); *Besel*, 146 Wn.2d at 738–39; *Chaussee v. Md. Cas. Co.*, 60 Wn. App. 504, 512, 803 P.2d 1339, 812 P.2d 487 (1991). As discussed below, that procedure is equitable. It does not grant to Farmers a right to a jury trial that belonged to Best Plumbing. And it does not transform the equitable reasonableness determination into an entitlement to further protract the proceedings by litigating the matter to a jury and whatever further appeals Farmers envisions.

B. Reasonableness hearings are equitable and, therefore, decided by a judge.

There is no right to a jury when a proceeding is equitable. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 160–161, 795 P.2d 1143 (1990), unanimously holds that reasonableness hearings are equitable and, therefore, no jury right attaches. *See also Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 267, 199 P.3d 376 (2008) ("When the insurer had an opportunity to be involved in a settlement fixing its insured's liability, and that settlement is judged reasonable **by a judge**, then it is appropriate to use the fact of the settlement to establish liability and the amount of the settlement as the presumptive damage award for purposes of coverage." (emphasis added)).

Before *Schmidt*, Washington recognized that judges, not juries, decide whether a settlement is reasonable. In *Glover*, 98 Wn.2d at 718 (emphasis added), the Court unanimously articulated criteria that were "proper considerations for a **trial judge** to use in approving settlements. ... The **trial judge** faced with this task must have discretion to weigh each case individually." A reasonableness hearing, *Glover* reasoned, is not supposed to be a cumbersome "mini-trial." *Id.* at 717. In class actions, CR 23(e) has for more than 40 years required "approval of the court" for

settlements.[1] The test a trial judge applies to evaluate a class-action settlement is basically the same as the test used in the insurance and contribution settings. *Compare Glover*, 98 Wn.2d at 717–18, *with Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d at 178, 188–89, 35 P.3d 351 (2001) (articulating criteria that apply to class-action settlements, including the likelihood of success by the plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; and the presence of good faith and the absence of collusion).

C. Trial judges are in a superior position to evaluate the reasonableness of a settlement.

Farmers advances, as one of its premises, the contention that covenant judgments present the risk of collusion. Appellant's Br. at 30–31. But the reasonableness-hearing procedure is designed to protect the insurer from that risk. The Court concluded, "Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith." *Besel*, 146 Wn.2d at 738. *Besel* holds that the amount of the covenant judgment serves as the presumptive measure of an insured's harm caused by an insurer's tortious bad faith only if the covenant

[1] The 1967 rules are published in Volume 71 of the Washington Reports, Second Series.

judgment is found reasonable based on the criteria articulated in *Glover* (and later repeated in *Chaussee*). *Besel*, 146 Wn.2d at 738. "This approach promotes reasonable settlements and discourages fraud and collusion." *Id.*

Farmers' conclusion that it is entitled to a jury determination of reasonableness does not, in any event, flow logically from the premise that there is a risk of collusion or fraud. Such a risk does not convert an equitable proceeding into a legal one. And Farmers presents no evidence that a jury is better able to decide the reasonableness of a settlement or identify fraud and collusion. The opposite is true. A trial judge is in a superior position to evaluate the matrix of legal and factual considerations upon which the reasonableness of a settlement depends. In *Alton M. Johnson Co. v. M.A.I. Co.*, 463 N.W.2d 277, 279 (Minn. 1990), the Minnesota supreme court concluded that reasonableness hearings are equitable, and therefore do not require a jury. The Minnesota court stated:

> [The insurer] argues this case is no different than a historically "legal" action for the recovery of money. We believe, however, this case is more accurately portrayed as an action to enforce an agreement against an indemnifier who was not a party to the agreement. The decisionmaker is being asked to apply its sense of fairness to evaluate a compromise of conflicting interests, a characteristic role for equity. **In short, this action is more like an action in equity, which traditionally is tried to the court.**

Id. (emphasis added). The court explained that the nature of the evidence at a reasonableness hearing "does not lend itself well to appraisal by a jury." *Id.*

> The ultimate issue to be decided is the reasonableness of a settlement which avoids a trial. **Reasonableness, therefore, is not determined by conducting the very trial obviated by the settlement.** Consequently, the decisionmaker receives not only the customary evidence on liability and damages but also other evidence, such as expert opinion of trial lawyers evaluating the "customary" evidence. This "other evidence" may include verdicts in comparable cases, the likelihood of favorable or unfavorable rulings on legal defenses and evidentiary issues if the tort action had been tried, and other factors of forensic significance.

Id. (emphasis added). Thus the *Alton M. Johnson* case correctly concludes, "The evaluation of this kind of proof is best understood and weighed by a trial judge." *Id.*

D. Adopting Farmers' position would harm important public policies.

1. Farmers' position discourages settlements in this and other contexts.

Farmers' core argument is that a jury must determine the reasonableness of the settlement between Mr. Bird and Best Plumbing because the determination affects the damages award that might be entered against Farmers, a nonsettling party, in a future case. But the result of a reasonableness hearing generally affects the damages that can be recovered in a future action—not just in the insurance setting but in the

contribution and class-action settings as well. In contribution cases, the amount of a settlement found reasonable by a judge is subtracted from a later damages verdict against a nonsettling defendant. RCW 4.22.060(2); *Glover*, 98 Wn.2d at 716. In class actions, objecting class members are precluded from obtaining damages beyond the amount established by a judicially approved settlement. *See* CR 23(e) (stating that a class action shall not be compromised "without the approval of the court"); *see also Pickett*, 145 Wn.2d at 188.

As seen, Washington law holds that reasonableness hearings are equitable proceedings to which no jury right attaches. It is nonetheless important to understand that, because reasonableness hearings generally affect damages, the logic of Farmers' position would compel jury trials over *Besel*-type settlements as well as settlements in the contribution and class-action settings. This would harm public policy by greatly discouraging settlements. *See Kottler v. State*, 136 Wn.2d 437, 452, 963 P.2d 834 (1998) (Talmadge, J., concurring) ("Three key principles today animate Washington's civil justice system and are reflected as goals of our tort law: (1) compensation to injured victims; (2) apportionment of fault to wrongdoers according to their share of fault; and (3) encouragement of settlements."); *see also Pickett*, 145 Wn.2d at 190 (holding that review of a settlement is limited to "assessing rough probabilities of success as they

existed at the time of settlement" because "any other approach would directly stifle litigants' willingness to settle class action claims, a result contrary to the policy favoring settlements").

2. Farmers' position harms important public policies regarding insurance.

Beyond the policy encouraging settlements, there is a strong public policy requiring liability insurers to treat their insureds with good faith. *See* RCW 48.01.030 ("The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all matters."). The source of this duty is "the fiduciary relationship existing between the insurer and insured." *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 385, 715 P.2d 1133 (1986). "Such a relationship exists not only as a result of the contract between the insurer and the insured, but because of the high stakes involved for both parties to an insurance contract and the elevated level of trust underlying insureds' dependence on their insurers." *Id.*

Requiring a jury trial to determine the reasonableness of a settlement is a contradiction of Washington public policy, which gives insureds the right to enter into a settlement **without** having to go through the trial. A jury trial also disadvantages the insured by depriving him of one of the strongest motivators for a plaintiff to settle any case—the

avoidance of an expensive, time-consuming jury trial. As this Court observed in *Pickett*, one settles "to avoid litigation, not to be subsumed by it." 145 Wn.2d at 191. Finally, as discussed above, the covenant-judgment process currently encourages good behavior by all parties—from the litigants in the underlying tort case to the liability insurer. Farmers' position impairs the parties' ability to enter into a covenant judgment when they believe the insurer has acted in bad faith and, therefore, greatly diminishes this powerful incentive for liability insurers to act in good faith. *Besel*, 146 Wn.2d at 739–40 ("Insurers can avoid this result in the future by acting in good faith.").

II. THE PROCEEDINGS BELOW EASILY SATISFY DUE-PROCESS REQUIREMENTS.

A. The Court of Appeals addressed the issue before it.

In its petition for review, Farmers suggested that the Court of Appeals gave short shrift to its due-process argument when the court held, "Because the trial court properly denied Farmers' jury trial demand, we do not address its due process challenge." *Bird v. Best Plumbing*, 161 Wn. App. 510, 260 P.3d 209, 216 n.6 (2011). Farmers did not make its due-process argument before the superior court. And the due-process argument before the Court of Appeals was as follows: "Because Farmers has the right to have a jury determine civil damages in Washington State, violation of that right is a due process violation as well as the violation of

the right to a jury trial." Appellant's Br. at 22. Because there is no right to a jury in an equitable reasonableness hearing, the Court of Appeals' disposition was correct.

B. There is no irrebutable presumption in a reasonableness hearing.

In its petition for review, Farmers also argued that it is the victim of an unconstitutional irrebuttable presumption as some form of "punishment." Not so. To begin with, *Besel* holds that an insurer can rebut a reasonableness determination with a showing of fraud or collusion. 146 Wn.2d at 739. More importantly, there is **no** presumption, much less an irrebutable one, at a reasonableness hearing. The burden is on the settling parties to prove the settlement is reasonable. *Chaussee*, 60 Wn. App. at 512. The insurer has a forum in which to contest settlement in a meaningful fashion, which sets this case apart from each of the cases cited in Farmers' petition. *Stanley v. Illinois*, 405 U.S. 645, 650, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (an unwed father was irrebuttably presumed to be an unfit parent); *Ware v. Phillips*, 77 Wn.2d 879, 881, 883, 468 P.2d 444 (1970) (a garnishee's failure to respond to a writ of garnishment, which did not notify him that a judgment might be taken against him, rendered the garnishee liable for the debt); *City of Seattle v. Ross*, 54 Wn.2d 655, 658, 344 P.2d 216 (1959) (a person found in the proximity of illegal

narcotics and who was not carrying an official authorization was irrebuttably presumed to be guilty of participating in narcotic traffic). The present case was a fiercely contested matter spanning half a year, involving discovery and thousands of pages of court filings. There is no comparison to cases like *Stanley*, *Ware*, or *Ross*.

III. THE COURT OF APPEALS CORRECTLY APPLIED RCW 4.24.630.

A. Review is for an abuse of discretion.

The trial court found that "the inclusion of some calculation for treble damages is reasonable," CP 3443, and it reduced those damages by 25 percent to reflect uncertainty, CP 3446. Farmers contends that the courts below misapplied RCW 4.24.630, which authorizes treble damages in certain cases of intentional trespass. The issue before the trial court was whether the settlement was reasonable based on the facts and the law as understood by the parties at the time of settlement. An appeal from a reasonableness hearing does not call for a de novo interpretation of the statute but a determination of whether the trial court abused its discretion in finding that "the inclusion of some calculation for treble damages is reasonable," CP 3443. *Glover*, 98 Wn.2d at 718; *Water's Edge*, 152 Wn. App. at 584; *see also Pickett*, 145 Wn.2d at 191 (holding that review of a

reasonableness determination does not call for a decision on the merits).[2] As explained in Mr. Bird's brief before the Court of Appeals, both the trial court and Court of Appeals applied the statute as written and consistent with prior cases. There was no abuse of discretion.

B. *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002), lends Farmers no support.

Farmers cited *Borden* in its petition for review. Because Farmers did not cite the case in its opening brief at the Court of Appeals, Mr. Bird did not address it in his response.

The elements for treble damages, based on RCW 4.24.630's plain language, are: (1) a person goes onto the land of another; (2) that person causes waste or injury to the land or improvements; and (3) the act is wrongful because it is intentional and unreasonable while knowing or having reason to know that he lacks authorization to so act. Farmers argues that RCW 4.24.630 requires a plaintiff to show "an intent to cause harm," Pet. at 18, but the term *harm* appears nowhere in the statute. Nor is there a requirement that the plaintiff prove the precise form of damage that ensues; the statute simply requires intent to commit the act of waste or

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[2] In its petition for review, Farmers called Mr. Bird's demand for treble damages "belated" Pet. at 3, and stated that Mr. Bird "did not file a motion to amend his complaint" to seek those damages, *id.* at 2 n.1. But the Court of Appeals held that whether Mr. Bird "could have amended his complaint is not material" because "[t]he trial court is directed by CR 54(c) to grant relief to a party entitled to relief even if the party has not demanded such relief in his pleadings." *Bird*, 260 P.3d at 219. Farmers' petition did not challenge this holding of the Court of Appeals.

injury that triggered the damage. Once the plaintiff proves the three elements above, the defendant is liable for "treble the amount of the damages **caused by** the removal, waste, or injury." RCW 4.24.630(1) (emphasis added).

Borden says no different. In that case, the city approved permits for a project to discharge water into a wetland that neighbored the Bordens. 113 Wn. App. at 363. The city also helped design and pay for the project. *Id.* The Bordens' property flooded, and they sued the city. The discharge water did not itself flood the property, but the city's actions "supercharged" the ground so that water that would otherwise drain from the Bordens' property failed to do so. *Id.* at 373. The Court of Appeals held that the facts did not support a claim for trespass and that RCW 4.24.630 did not apply because the city did not intentionally cause waste or injury to the Bordens' land. *Id.* at 373–74. Unlike the city in *Borden*, the plumber here went onto Mr. Bird's property and intentionally cut a sewer pipe and removed a portion of it. He meant to do this, as counsel for Farmers admitted. 4 Tr. 640:6–10. The evidence missing in *Borden*, which prevented an award of treble damages, was present here.

C. The statute satisfies due process.

Farmers argued in its petition for review that "the imposition of treble damages for negligent conduct constitutes a violation of the

constitutional right to due process." Pet. at 19. But the statute requires more than bare negligence; it requires an intentional act of injury or waste. As discussed fully in Mr. Bird's Court of Appeals brief, the plumber acted in a truly reprehensible manner. Resp.'s Br. at 54–57. He cut a live, pressurized sewer pipe in three places, creating a hazard to health and property. The plumber then left without fixing the pipe and without telling anyone, in what can only be described as "indifference to or reckless disregard of the health or safety of others." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Finally, in the case cited by Farmers, *Campbell*, the Supreme Court said that a punitive-damages award that is a single-digit multiple of a compensatory damages award—like statutory treble damages here—is likely to pass constitutional scrutiny. *Id.* at 425; *see also Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 363 (8th Cir. 2009). Farmers' argument would upset a century's worth of law authorizing treble damages for willful trespass. *See Luedinghaus v. Pederson*, 100 Wash. 580, 584, 171 P. 530 (1918) (discussing the predecessor "timber trespass" statute).

RCW 4.24.630 satisfies due process.

CONCLUSION

Mr. Bird respectfully requests that this Court affirm.

RESPECTFULLY SUBMITTED this 7th day of November, 2011.

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Shannon K. McKeon

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES BIRD

Plaintiff/Petitioner

vs

No. 86109-9
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

BEST PLUMBING GROUP, LLC

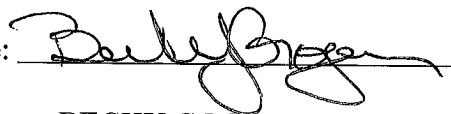
Defendant/Respondent

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the party who received the foregoing facsimile transmission for filing.
2. My address is: 120 Pear Street NE, Olympia, WA 98506
3. My phone number is (360) 754-6595
4. The e-mail address where I received the document is: oly@abclegal.com.
5. I have examined the foregoing document, determined that it consists of 27 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: November 7, 2011, at Olympia, Washington.

Signature: 

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